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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, a body corporate and politic; MEMBERS OF THE BOARD OF WATER AND POWER COMMISSIONERS OF THE DEPARTMENT OF WATER AND POWER, CITY OF LOS ANGELES; MEMBERS OF THE BOARD OF ADMINISTRATION OF THE DEPARTMENT OF WATER AND POWER EMPLOYES RETIREMENT, DISABILITY AND DEATH BENEFIT INSURANCE PLAN; HENRY G. BODKIN, JR.; KATHERINE B. DUNLAP; BURTON J. GINDLER; MICHAEL GLAZER; HERBERT C. WARD; LOUIS J. WEIDNER, JR.; RALPH E. POWELL; LEO W. SUDMEIER, JR.; WILLIAM D. SACHAU; and ROBERT W. PHILLIPS,

Defendants-Petitioners,

v.

MARIE MANHART, CAROLYN MAYSHACK, MARGERIE STOOP, ALICE F. MULLER and ETHYL L. LEHMAN, individually and on behalf of all other persons similarly situated; COMMITTEE TO PROTECT WOMEN'S RETIREMENT BENEFITS; and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 18,

Plaintiffs-Respondents.

Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE, In Support of Defendants-Petitioners

JAMES A. REDDEN
Attorney General of Oregon
AL J. LAUE
Solicitor General
WILLIAM F. HOELSCHER
Assistant Attorney General
and Counsel
100 State Office Building
Salem, Oregon 97310
Telephone: (503) 378-6260
Attorneys for the
State of Oregon

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BRIEF OF THE STATE OF OREGON AS AMICUS CURIAE, In Support of Defendants-Petitioners

INTEREST OF AMICUS

The State of Oregon provides for retirement benefits for its employes and for the employes of participating local government subdivisions through the Oregon Public Employes' Retirement System (P.E.R.S.) created by state statute in 1946. The system serves some 700 governmental units in Oregon, including the state and its agencies, counties, cities, police and fire

departments, school districts and numerous special purpose districts. The system currently has some 98,000 active and 21,000 retired participating employes, and assets of over one billion dollars.

The retirement system provides two types of service allowances; an employer-financed "life pension" based on a formula of years of service times final average earnings and an employe-financed individual account "refund annuity." These funds have a separate actuarial and accounting basis but are invested in a common fund.

The employer-financed "life pension" monthly benefit is identical as between similarly-situated male and female employes with greater employer costs and lifetime or total benefits to female employes as a group due to their longer life expectancy. The "refund annuity" portion of the retirement system is wholly employe-financed with contributions which are identical as to similarly situated males and females and are subject to federal and state income tax and other payroll taxes. These contributions are recorded in individual employe accounts. At the time of retirement, total contributions and earnings in an individual employe's account are used to "purchase" an annuity in one of several optional forms by transferring funds to the retirement system's "reserves" for this purpose.

The standard form of the "refund annuity" is one in which the employe receives a monthly benefit for life with a "refund" of unused contributions and earnings to a beneficiary at the time of the retiree's death. The amount of monthly "refund annuity" benefits for each employe is determined by use of age-and sex-differentiated actuarial tables. The actuarial annuity tables used by the retirement system reflect the actual mortality experience of participating male and female members of the fund and their beneficiaries.

In 1974, four female employe members brought an action against P.E.R.S. for declaratory and injunctive relief alleging violations of 42 USC §1983, Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of March 24, 1972 (42 USC §2000e et seq.) and the 14th Amendment to the United States Constitution. The United States District Court for the District of Oregon, the Honorable Gus J. Solomon presiding, found that the use of age-and sex-differentiated actuarial tables to calculate monthly "refund annuity" benefits was in violation of Title VII. *Henderson et al v. State of Oregon,* 405 F. Supp 1275 (D. Ore. 1975). Judge Solomon cited *Manhart v. City of Los Angeles,* 387 F Supp 980 (CD Cal 1975), and relied upon the legal principles expressed by Judge Harry Pregerson in that case.

The State of Oregon appealed the District Court's

ruling to the United States Court of Appeals for the Ninth Circuit, No. 76-1706. Oral argument was scheduled for October 3, 1977. That morning, it was announced that this Court had granted Certiorari to review *Manhart.* The Ninth Circuit Court, being aware of the similarities between the facts in *Manhart* and *Henderson,* removed *Henderson* from the oral argument calendar indefinitely pending decision by this Court.

STATEMENT OF FACTS

This case was brought by plaintiffs under Title VII of the Civil Rights Act of 1964, as amended in 1972, claiming a violation of Section 703 of the Act (42 USC §2000e-2). Three additional and separate claims for relief were based on the Civil Rights Act of 1871, 42 USC §1983, the 14th Amendment to the Constitution, and Article I, §§ 1 and 21 of the Constitution of California.

Plaintiffs are civil service employes of the City of Los Angeles Department of Water and Power and as such are members of a compulsory Retirement Plan of such city Department.

The Plan provides for several kinds of pension benefits at the employe's option. To fund the Plan, the employes and the Department contribute thereto. Because of their longer life expectancy as a group, women are required to make 15% higher contributions

than men to receive equal monthly retirement benefits as between women and men. The Department matches employe contributions 110% and thus contributes disproportionately more for women than for men. Since each employe has an absolute right to the return of all her or his contributions, plus a vested pension right, the present worth of all compensation paid by the Department to women employes is higher than the present worth of all compensation paid to men employes.

The plaintiffs contended in the District Court that differential contributions by men and women were per se illegal. The plaintiffs had not challenged but rather admitted the factual issues in the case that: (1) higher contributions were required of female employes than males because actuarial tables used in the administration of the Plan indicate that women in general live longer than men and that women would therefore tend to collect monthly payments for a longer period of time, (2) life expectancy and mortality tables are universal throughout the western commercial world in separating male mortality rates from female mortality rates, and no tables have yet been developed which measure life expectancy for annuity purposes on a unisex basis, and (3) the use of such tables could lead to a result which adversely affects the financial

integrity of an annuity or pension system such as the City's Plan.

On motion for summary judgment, the District Court held that even rational differentiation was illegal if related to sex:

> "In short, under the Equal Employment Opportunity Act of 1972, all stereotypic treatment of persons based on . . . sex whether rational or irrational is dead."

The District Court also enjoined larger contributions from females than males and ordered this Plan to refund the excess contributions collected on and after April 5, 1972, plus interest. The Court did not rule on claims based on §1983, the Fourteenth Amendment or the California Constitution.

Defendants appealed to the Ninth Circuit. The Court stayed the District Court's judgment pending appeal, insofar as it requires the refund of contributions. The Ninth Circuit Court opinion affirmed the District Court decision on all issues. In its opinion, the Ninth Circuit Court stated in part:

> "One district court case has dealt with a situation very similar to ours. In *Henderson v. Oregon,* D. Ore., 1975, 405 F. Supp. 1271, the court relied heavily on a scheme similar to that involved here illegal under Title VII."

SUMMARY OF ARGUMENT

(1) Legislative history indicates that Congress intended, and still intends to permit the use of age- and sex-differentiated mortality tables as a basis for determining pension benefits under all applicable federal statutes.

(2) The use of age- and sex-differentiated actuarial and annuity tables to calculate monthly "refund annuity" retirement benefits which provide an actuarial return of employe contributions does not discriminate against female employes because such tables validly reflect the universally acknowledged longevity of females over males and are a reasonable sex-based classification for the valid purposes of maintaining actuarial soundness of the retirement fund.

(3) The Title VII Sex Discrimination Guidelines of the EEOC and EEOC Decision No. 74-118 are of no assistance in determining this issue because of the delegation by Congress to and the rulings of other equally responsible federal agencies.

ARGUMENT

Point One

It was not, and is not, the intention of Congress to prohibit the use of age- and sex-differentiated actuarial and annuity tables in implementing the sex discrimination provisions of Title VII of the Civil Rights Act of 1964, as amended.

Congressional history shows that it was not, and is not, the intention of Congress to prohibit the use of

sex-differentiated actuarial tables in funding pension systems and distributing benefits.

(a) *Congressional Intent in 1964:*

When Congress enacted Title VII of the Civil Rights Act of 1964 it did so against the background of the passage of the Equal Pay Act of 1963 (77 Stat 56) just the year before. The Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act of 1938, specifically section 6(d) (29 USC §206(d)) and required employers to pay equal wages for substantially equal work without regard to sex.

The heart of the Equal Pay Act is Section 6(d)(1) (29 USC §206(d)(1)):

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the bases of sex by paying wages to employes in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, *except where such payment is made pursuant to* (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex:* Provided, Than an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." (Emphasis supplied)

The legislative history of the Equal Pay Act shows that different periodic pension benefits resulting from differences in longevity is precisely the sort of "differential" intended by exemption (iv) of Section 6(d)(1). In the original subcommittee version of the bill, the sole exception to the equal pay rule permitted differentials between males and females only when based upon a "seniority or merit increase system." (HR 3861, §4(a); S 882, §4, and S 910, §4(a), 88 Congress, First Session (1963)). Testimony at Senate and House hearings in March and April, 1963, raised the objection that it costs more to employ women than men, and that these added expenses ought to be a justification for wage differentials. One of the specific examples cited as an increased cost to employ female workers was the additional cost of providing retirement benefits due to greater longevity of women (Hearings-Senate at 142, 145; Hearings-House at 103, 184-188, 241). As a result, a bill was reported out of the committees in both houses of Congress with a new provision excepting from the requirement of equal pay for equal work "a differential based on any factors other than sex." (HR 6060, quoted in HR 309 and S Rep 176 (88th Congress Session (1963)). The Senate reports specificlly noted the longevity problem at issue here (S Rep 176, *supra,* at 4) and indicated that such

differences in cost would constitute a "factor other than sex" justifying a differential in wages:

> "It is the intention of the committee that where it can be shown that on the basis of all of the elements of the employment costs for both men and women, an employer will be economically penalized by the elimination of a wage differential, the secretary can permit an exception similar to those he can permit for a bonafide seniority system or other exception mentioned above." *Ibid.*

When Congress enacted Title VII of the Civil Rights Act in July of 1964, it was a concern that Title VII was not in conflict with the Equal Pay Act. It therefore added that part of Section 703(h) of Title VII (42 USC §2000e-(h)) known as the Bennett Amendment. This amendment "interlocks" Title VII with the exceptions provided by Section 6 of the Equal Pay Act:

> "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employes of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended." (29 USC 206(d).

The first three exceptions of the Equal Pay Act relating to seniority systems, merit systems, and systems measuring earnings by quantity or quality of production (exceptions i, ii and iii of 29 USC 206(d)(1)) were already specifically included in §703(h) of the Civil Rights Act. The only additional exception

presented by the Bennett Amendment was the fourth exception involving differentials "based on any other factor other than sex." The intent of this amendment was to incorporate into Title VII the defenses that were permitted by the Equal Pay Act. 110 Cong Rec 13647 (June 12, 1964).

The Bennett Amendment specifically contemplated differences in pension and retirement benefits between men and women. This is clearly stated in a colloquy between Senator Humphrey, the floor manager of the civil rights bill in the Senate, and Senator Randolph (110 Cong Rec 13663-64, June 12, 1964):

> "Mr. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota [Mr. HUMPHREY], who is the effective manager of the pending bill, a clarifying question on the provisions of title VII.
>
> "I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.
>
> "Am I correct, I ask the Senator from Minnesota, in assuming that *similar differences of treatment in industrial benefit plans,* including earlier retirement options for women, *may continue in operation under this bill, if it becomes law?*
>
> "Mr. HUMPHREY. *Yes. That point was made unmistakably clear earlier today by the adoption of*

the Bennett amendment; so there can be no doubt about it.

"Mr. RANDOLPH. I am grateful for the reply." (Emphasis added)

Thus, the legislative history of §703 of Title VII shows the clear Congressional intent to preserve the exceptions of the Equal Pay Act of 1963 (29 USC §206(d)). And *see Schultz v. Wheaton Glass Co.,* 412 F2d 259 (3rd Cir 1970), *cert den* 398 US 905 (1970), where the court held that the Civil Rights Act and the Equal Pay Act are *in pari materia,* and must be read together.

(b) *Administrative Interpretation.*

The Wage-Hour Administrator is charged with the administration of the Equal Pay Act and his opinions are entitled to "great deference" (*Griggs v. Duke Power Co.,* 401 US 424, (1971)). He has repeatedly and implicitly recognized that actuarial differential treatment of men and women does not violate the Equal Pay Act (*Hodson v. Jones,* 453 F2d 515, 518 (8th Cir 1971), *reh den* (1972)). For instance, the current Wage-Hour Equal Pay Act administrative regulations, 29 CFR §800.116(d) (30 FR 11504, September 9, 1965, as amended at 31 FR 6770, May 6, 1966) provide:

> "(d) *Contributions to employee benefit plans.* If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees."

In interpreting these administrative regulations, the Wage-Hour Administrator has consistently made determinations that no wage differential prohibited by the Equal Pay Act will result if no contributions are made by the employer to the benefit plan or where either the contributions to or the resulting benefits from the plan are equal for both sexes. In his first determination on the subject, Wage and Hour Opinion Letter (January 27, 1967), the Administrator held that if no contributions to an employe group insurance plan are made by the employer, such differentials do not violate the Equal Pay Act (CCH Employment Practices, ¶¶1208 and 1208.31). In Opinion Letter No. 1117 (WH-70) dated August 25, 1970, the Administrator stated in part:

> "This is in further reference to your letter in which you inquired about the application of the equal pay provisions to the amounts an employer contributes toward a retirement or pension plan in behalf of his employees. . . . After giving the question considerable study in the light of the complex issues involved, we have now arrived at a determination

that an employer's contributions to a plan providing retirement or pension benefits to his employees will be considered as 'wages' within the meaning of the Equal Pay Act. We are, therefore, taking the position that where an employer's contributions to such a plan are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to employees in question may be greater for one sex than for the other. The fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered a violation of the Equal Pay Act if the resulting benefits are equal for employees of both sexes where the equal pay standard otherwise applies."

In Opinion Letter No. 1276 (WH-224) dated April 26, 1973, the Administrator again reviewed the problem in the light of the adoption by the EEOC of its 1972 contrary administrative regulations. In the letter, the Administrator states in part:

"Specifically you ask: 'If an employer makes equal contributions to a retirement plan covering male and female employees but if, as a result of separate actuarial tables used by the plan's administrators, the female employees, other things being equal, receive smaller monthly retirement benefits, is the employer in violation of the equal pay provisions.' "

In finding that the Employer would not be in violation, the Administrator states in part:

"In response to your initial question, our opinion letter of August 25, 1970 [W&H Opinion Letter No. 1117] sets forth our current position under the

Equal Pay Act. We are cognizant of the recent amendments to the Civil Rights Act and the Guidelines issued by Equal Employment Opportunity Commission [EOCC] on pension benefits and we will continue to watch developments in this area. However, we do not anticipate any change in our position in the immediate future."

In sum,

"An employer is not in violation of the equal pay provisions of the Fair Labor Standards Act if it makes equal contributions to a retirement plan covering male and female employees but, as a result of separate actuarial tables used by the plans administrators, female employees, other things being equal, receives smaller monthly retirement." CCH Labor Law Reports ¶30875.

This interpretation is also embodied in the sex discrimination guidelines of the Office of Federal Contract Compliance (OFCC) to whom the Secretary of Labor has delegated the responsibility of implementing Executive Order 12246 as amended (3 CFR 169). In substance, that order provides that all government contracting agencies shall include specific terms in their contracts to provide for non-discrimination in employment by government contractors and their subcontractors. The original OFCC sex discrimination guidelines state:

"The employer must not make any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment. In the area of employer contributions for insurance, pensions, welfare programs and other similar

'fringe benefits' the employer will not be considered to have violated these guidelines if his contributions are the same for men and women or if the resulting benefits are equal." 41 CFR 60-20.3(c) (1970).

As recently as June 14, 1975, the Secretary of Health, Education and Welfare has ruled concerning discrimination in educational institutions:

"HEW is responsible for administration, pursuant to OFCC regulations, of the Executive Order as to Federal contractors who are educational institutions, Virtually all recipients subject to this Part 86 are also subject to Title VII and many are also subject to the Executive Order. * * *

"Accordingly, [the Secretary] continues to follow the Executive Order regulations in requiring that fringe benefit plans provide either for equal periodic benefits to members of each sex or equal contributions by the employer for members of each sex (§86.39 imposes identical requirements for student benefit plans). The Title VII Sex Discrimination Guidelines of the EEOC differ in that they prohibit payment of unequal periodic benefits on the basis of sex and preclude employers from justifying unequal periodic benefits on the basis of differences in cost for males and for females." 40 Fed Reg 24135 (June 4, 1975).

(c) *Present Congressional Intent*

In 1974, Congress enacted the Pension Reform Act of 1974 (the Employee Retirement Income Security Act of 1974, commonly "ERISA"), to ensure proper pension funding (P L 93-406, 88 Stat 829). Presently before Congress is HR 9155, a bill to provide the same

pension reform for state and local public service employes to be entitled the "Public Service Employees Retirement Income Security Act of 1975." The provisions of the proposed public ERISA are almost identical with those of the private ERISA which is now law.

There are two very significant factors in ERISA which must be considered in determining this case. First, there are certain minimum funding standards with actuarial requirements (Act §302-305, 1013, 26 USCA (IRC 1954) §410, et seq). Second, under the act (Act §2002(b), IRS §408) an employe may leave an employer and transfer both his own and the employer's plan contributions to an individual retirement account or to a different employer's plan. The agency specifically established by Congress to ensure pension plans under ERISA, the Pension Benefit Guaranty Corporation (Act §§4001-40821) has already recognized the propriety of using sex-differentiated actuarial tables:

On December 12, 1975, the Pension Benefit Guaranty Corporation published proposed regulations on the valuation of plan assets and benefits (40 FR 57980, 57982, 29 CFR 2610, 2611). In the valuation of plan benefits under ERISA requirements, the federal agency has proposed six sex-differentiated mortality tables—a male and a female table of healthy participants, a male and a female table for disabled

participants, and a male and a female table for disabled participants receiving social security disability benefit payments.

Point Two

The universally acknowledged longevity of females over males is a valid basis for calculating an actuarial return of employe contributed retirement benefits and therefore does not discriminate against females in violation of Title VII.

This case is one of first impression. The Court's holding in this case may well, however, decide or control the Ninth Circuit Court's decision in *Henderson, supra.* Additionally, this case is the harbinger of a number of cases the holding in which could affect the financial soundness of public, as well as private, pension plans across the country. *See, e.g., Smith v. County of Los Angeles,* (Cal CDD 74-253 DWW) and *Spirit v. Teachers Insurance and Annuity Assoc.,* (NY SD 74 Civ. 1674 RJW). The full impact of this Court's decision in *Henderson, supra,* will be widespread and profound.

The congressional intent expressed in the legislative history previously reviewed and the determinations of the Wage-Hour Administrator made applicable to this matter by the Title VII—Equal Pay Act "interlock" provision of §703(h), *supra,* provide no basis for a finding that the increased contributions

required of females to receive equal benefits in this case in any way violate §703(a) of Title VII.

In the past, the EEOC has expressly honored this congressional intent in its guidelines (30 FR 14926, 14928, December 2, 1965); §1604.7 provided in relevant part as follows:

> "Section 1604.7. Relationship of Title VII to the Equal Pay Act.
>
> "(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (Section 6(d) of the Fair Labor Standards Act of 1938, 29 USC 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets §703(a) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII.
>
> ". . . . .
>
> "(b) Accordingly, the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. . . ."

The EEOC followed the Wage-Hour Administrator's interpretations until April, 1972, when it declared that it would no longer be bound by the Wage and Hour Administrator's interpretations. It then revised its guidelines to state that:

> "It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory

> retirement ages based on sex, or which differentiates in benefits on the basis of sex." (29 CFR §1604.9(f) (1972)).

In its first interpretation of this revised guideline two years later (No. 74-118, April 26, 1974), the EEOC concluded that the use of separate mortality tables for men and women to determine retirement benefits was in violation of Title VII.

The revised EEOC sex discrimination guidelines are in opposition to the congressional intent in Title VII and in direct conflict with the fourth exception to the Equal Pay Act which permits a compensation "differential based on any other factor other than sex. . . ." 29 U.S.C. §206(d)(1). The district court in the *Manhart* case, *supra* at 984, and the district court in the *Henderson, supra,* disposed of the defendant's contentions in this regard with the conclusion:

> "Even if section 206(d)(1) (of the Equal Pay Act) applies to this case, the court believes that differentiation based on sex segregated actuarial tables constitute a differential based on the 'factor' of sex in violation of that section."

This conclusion of the district courts below is not only in opposition to the congressional intent but fails to recognize the universally accepted scientific fact that women have a greater life expectancy than men. Plaintiffs in both cases accept this fact. It is a

universal truth.[1] The data presented to the district courts in both cases detailed the reliance of all pertinent federal agencies on the fact of this longevity differential. The United States Bureau of Census, estimates that this differential is growing, and between now and the year 2050, United States women can expect a life span of up to 81 years and men up to 71.8 years.[2] This is an increase in longevity of four years for women and almost three for men.

Section 703(a) of Title VII of the Civil Rights Act of 1964 enumerates the unlawful practices of "employers" covered by this act. These practices are divided into discrimination *against individuals* and unlawful *classification* of employes because of "race, color, religion, sex or national origin."

Section 703(a) provides:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(1) To fail or refuse to hire or to discharge any individual, or otherwise *to discriminate against any individual* with respect to his compensation, terms, *conditions or privileges of employment* because of such individuals's race, color, religion, sex or national origin."

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[1]See for example U.S. News and World Report, March 12, 1973, p 59, where all of the 25 countries listed in the United Nations' population report showed greater female longevity than male; in the United States women lived an average of 7.5 years longer.

[2]Current Populations's Reports, Population Estimates and Projections Series P-25, No. 704 issued July, 1977, United States Department of Commerce, Bureau of Census.

> "(2) To limit, *segregate, or classify his employees* or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his satus as an employee, because of such individual's race, color, religion, sex or national origin." 42 USC §2000e-2(a)(1)-(2). (Emphasis added)

An employe has a right of action under either of these provisions, but the proscribed condition in section (1) is discrimination against the employe as an *individual,* while section (2) concerns itself with an individual's loss of rights by segregation or *classification* into unlawful groupings.

The Second Amended Complaint in this matter did not specify which kind of discrimination was being alleged. Defendants denied either kind.

The district court determined that the major question on the Motion for Summary Judgment was: ". . . whether the Department's practice of requiring women to make larger monthly contributions to the retirement plan than men constitutes "[discrimination] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ." within the meaning of §703(a)(1) of the Equal Employment Opportunity Act of 1972. 42 U.S.C.A. §2000e-2(a)(1) (West 1974). *Manhart, supra.* Apparently, the court's decision to place the alleged discrimination

under §703(a)(1) rather than §703(a)(2) was based on its view that ". . . sexual discrimination under §703(a)(1) exists whenever general fact characteristics of a sex-defined class are automatically applied to an individual within that class." (Cases cited) *Manhart, supra.* Because of its conclusion that ". . . all stereotypic treatment of persons based on race, religion, or sex whether rational or irrational is dead.", the District Court did not reach the issue of whether the *classification* was reasonable or for a valid and necessary purpose.

The record shows defendants have not discriminated against plaintiffs as *individuals* in any terms or conditions or employment. Plaintiffs have been treated as *members of a class* because it is not possible to treat persons as individuals for annuity pension purposes. There is no test which will indicate when an *individual* will die; one must look at some sort of *group* or *class* mortality statistics to even approximate when retirement will be terminated by death.

The actuarial and annuity tables at issue in this case accurately reflect the life expectancy of individual retirees by the classifications of age and sex at the time of retirement. Because the *only* use of the tables is to determine *how long* the retiree may be expected to live so that the contributions he or she has made can be returned over the number of months and years they

will be needed, the tables classify employes as to *life expectancy,* not sex. Thus, a person with a life expectancy at retirement of 10 years will receive a pension in periodic payments of precisely the same amount as every other person choosing the like option with the same contributions and a life expectancy of 10 years. This is so whether the individual is male or female.

Grouping individuals for actuarial purposes is thus necessary for there to be any pension system *at all.* The question remains as to whether grouping *by sex* is permissible sex "stereotyping." The district courts in this case and in *Henderson, supra,* thought it was. They were wrong.

The district court relied on a line of cases dealing with the application of general fact characteristics of a sex-defined class[3] to arrive at the conclusion that "all stereotypic treatment of persons based on race, religion, or sex whether rational or irrational is dead." All of these cases involved "stereotypic treatment" which was irrational and based neither on fact nor business necessity. *Phillips, supra,* dealt with the denial of employment to women with pre-school children, where men with pre-school children were being hired. In *Rosenfeld, supra,* the court considered an employer's

[3] *Phillips v. Martin Marietta Corp.,* 400 US 542 (1971); *Rosenfeld v. Southern Pacific Co.,* 444 F2d 1219 (9th Cir 1971); *Sprogis v. United Air Lines,* 444 F2d 1194 (7th Cir 1971); *Willingham v. Macan Telegraph Pub. Co.,* 482 F2d 535 (5th Cir 1973).

policy of excluding women from consideration for jobs requiring lifting in excess of certain weight limitations. *Sprogis, supra,* grappled with whether the employer could enforce a "no-marriage" rule on female flight stewardesses when no such rule applied to males. *Willingham, supra,* concerning the fate of long haired males versus long haired females under a company dress code.

Title VII must be given a practical construction to promote the ends it was designed to achieve, *McDonnell Douglas Corporation v. Green,* 411 US 792 (1970). The decisions discussed are consistent with such a practical construction. It was a simple matter for the court to require the employer to make its employment decision by considering an individual female applicant based on her own strength. It *can* and, therefore, should be determined whether a woman can lift a 40-pound weight or whether a woman can perform effectively as an airline stewardess while married or as a working mother with children. Likewise, the business necessity and reasonableness of an employe dress code can and should be easily determined.

But these typical sex discrimination cases, though involving classification rather than individual discrimination, cannot be equated with the present case. The very nature of a pension annuity requires careful selection and classification to provide an equitable

allocation of benefits to the annuitants who contributed them and to insure the continuation of a viable fund.

This Court must consider the practical *need* for using such tables as a principal factor in determining whether the use of these tables in the context of this case constitutes the type of invidious treatment based on sex Title VII was designed to prevent.[4]

It is undisputed that females as a class live longer than males and that younger people as a class live longer than older people. That is why the defendants use age- and sex-differentiated actuarial and annuity tables similar to those used by the insurance industry, the IRS and other federal agencies; the only difference is defendants' tables are validated because they are based upon the actual experience of this fund.

Further, factors other than age and sex have not been considered satisfactory indicators of longevity. For example, although blacks have a higher death rate than whites, given the same economic and environmental factors, race or color is of no consequence. The *Participant* TIAA-CREF, July 1973. Since black and white annuitants under this plan enjoy comparable economic and environmental circumstances, no dis-

[4] *See Griggs v. Duke Power Company,* 401 US 424, 430-431 (1971):

"What is required by Congress is the removal of *artificial, arbitrary,* and *unnecessary* barriers to employment when the barriers operate *invidiously to discriminate* on the basis of racial or other impermissible classifications." (Emphasis added)

tinction can or should be made. Similarly, although smoking and drinking can affect longevity, the extended period covered by annuities plus the group concept make such individual personal habits unmeasureable objectively. *Ibid.*

Sex and age emerge as the only actuarially viable indicators of longevity. Although such classifications do not insure perfect justice among all annuitants, they do insure in large measure an equitable distribution of benefits as well as the solvency of the employe-contributed fund.

Assuming arguendo that this Court finds that the age- and sex-differentiated actuarial and annuity tables which require increased contributions by women are based on fact, are rational and reasonable, and are a business necessity in the employe contribution supported pension annuity context, does Title VII still flatly invalidate such tables because they represent a sex-related classification however rational?

In *Gruenwald v. Gardner,* 390 F2d 591, 592 (2nd Cir 1968), the court considered a challenge to the Federal Social Security Act by a man who received less monthly benefits at age 62 than a woman would have received similarly situated. The Court upheld the differentiated benefit formula on a constitutional basis with dicta on the issue of Title VII and stated:

"It is only the 'invidious discrimination' or the

classification which is 'patently arbitrary [and] utterly lacking in rational justification' which is barred by either the 'due process' or 'equal protection' clauses. [Citations omitted] A classification or regulation, on the other hand, 'which is reasonable in relation to its subject and is adopted in the interests of the community is due process.'

". . . .

"The appellants' case was well and forcefully presented but the trend of authority makes it clear that the variation in amounts of retirement benefits based upon differences in the attributes of men and women is constitutionally valid. *The appellant does not press his argument that the section in question is violative of the Civil Rights Act of 1964,* 78 Stat. 253 (1964), *but we find that contention is also without merit."* 390 F2d at 592-593. (Emphasis supplied)

This Court in *Reed v. Reed,* 404 U.S. 71, 75-76 (1971), unanimously articulated the proper analysis for a constitutional claim of improper sex classification:

> "In applying [equal protection standards] this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. . . . The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' "

The criterion to be used in applying the *Reed* analysis to circumstances such as those presented in the instant case was enunciated by this Court recently in *Geduldig v. Aiello,* 417 U.S. 484 (1974). That case concerned California's disability insurance system, which excluded from coverage disability accompanying normal pregnancy and childbirth. The plaintiff claimed that this exclusion violated her rights to equal protection of the law under the Fourteenth Amendment. Like the plaintiffs' argument in this case, the plaintiff in *Aiello* contended that *any* distinction based upon differing characteristics of men and women was unconstitutional. The contention was summarized by Justice Brennan in his *Aiello* dissent:

> "In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination." 417 US at 501.

The majority in *Aiello* rejected this argument. Justice Stewart, writing for the majority, first distinguished the situation before the Court from cases in which distinctions had been drawn between men and women based solely upon their gender:

> "The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed,* 404 U.S. 71, and *Frontiero v. Richardson,* 411 U.S. 677,

involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition —pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed, supra,* and *Frontiero, supra.*" 417 US at 496, n 20.

The opinion continued, in language having direct application to this case:

"Normal pregnancy is an *objectively identifiable physical condition* with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." *Id.* (Emphasis supplied)

The instant case, no less than *Aiello,* involves a distinction based upon an "objectively identifiable physical condition," *i.e.,* greater female longevity. Here, the fact of female longevity is "objectively identifiable" through the use of established statistical techniques.

In *General Electric Company v. Gilbert,* 429 U.S. 125 (1976), this Court reversed the decision of six separate Courts of Appeals which had held that Title

VII required employers to pay the extra cost of pregnancy disability coverage for women. Applying the same analytic approach applicable to Equal Protection Clause claims enunciated in *Geduldig v. Aiello, supra,* the Court held that exclusion of pregnancy related disabilities from an otherwise comprehensive nonoccupational sickness and disability plan was not invidious gender-based discrimination in violation of Title VII. The Court held that, so long as an employer provided insurance of *equal value* to men and women, there was no requirement under Title VII that payment also be made for an extra risk which may be presented by one sex. Speaking for the Court, Justice Rehnquist reasoned (429 U.S. at 139, n. 17):

"Absent proof of different values, the cost to 'insure' against the risks is, in essence, nothing more than extra compensation to the employees, in the form of fringe benefits. If the employer were to remove the insurance fringe benefits and, instead, increase wages by an amount equal to the cost of the 'insurance,' there would clearly be no gender-based discrimination, even though a female employee who wished to purchase disability insurance that covered all risks would have to pay more than would a male employee who purchased identical disability insurance, due to the fact that her insurance had to cover the 'extra' disabilities due to pregnancy. . . .

"Yet, in both cases—the instant case and the case where there is no disability coverage at all—the ultimate result is that a woman who wished to be fully insured would have to pay an

incremental amount over her male counterpart due solely to the possibility of pregnancy-related disabilities. Title VII's proscription on discrimination does not require, in either case, the employer to pay that incremental amount. *The District Court was wrong in assuming, as it did, 375 F. Supp., at 383, that Title VII's ban on employment discrimination necessarily means that 'greater economic benefit[s]' must be required to be paid to one sex or the other because of their differing roles in 'the scheme of human existence.' "(Emphasis added).*

Turning to the EEOC 1972 Guidelines, the Court held that such guidelines conflict with earlier EEOC pronouncements, are at odds with the consistent interpretations of the Wage and Hour Administrator with respect to §703(b) of Title VII, as amended by the Equal Pay Act, and with the legislative history of Title VII, both of which support the "plain meaning" of the language used by Congress when is enacted §703(a)(1). The Court stated (429 U.S. at 412):

> "Contrary to it (EEOC guideline of 1972) are the consistent interpretation of the Wage and Hour Administrator, and the quoted language of Senator Humphrey, the floor manager of Title VII in the Senate. *They support what seems to us to be the 'plain meaning' of the language used by Congress when it enacted §703(a)(1).*" (Emphasis added).

The Supreme Court of Indiana considered a sex-differentiated actuarial table equal protection and Title VII complaint less than three months after this Court's opinion in *Gilbert, supra; Reilly v. Robertson,*

360 N.E.2d 171. In a 3 to 2 decision which makes no reference to *Gilbert,* the Indiana Supreme Court found that the State Teachers' Retirement Fund's use of separate actuarial tables for men and women retired teachers violated the equal protection clauses of the Constitution of the United States and of Indiana without reaching a determination of the Title VII violation contentions. Of the two concurring opinions, one Judge stated that he did so on the sole basis that ". . . there is no showing or evidence presented by the Appellant Board that women *teachers* live longer than men *teachers.*" (Emphasis added). If such evidence had been present as in the case below and in Henderson, supra, query whether a 3 to 2 majority would have found no violation. In his dissenting opinion Chief Judge Given stated (360 N.E.2d at 180) in part:

". . .

> "There is no question that the law stated by the majority is correct in that the equal protection clauses of the Constitutions of the United States and of Indiana and the Civil Rights Act of 1964 all require that persons receive equal treatment. However I do not agree with the majority that when this law is applied to the facts in the case at bar the result is an invalidation of the adoption of the separate actuarial table for men and women retired teachers for the purpose of the computation of their benefits to be paid from the Teachers' Retirement Fund.
>
> "Prior to the adoption of that method of determining benefits, men teachers and women teachers

were charged equal premiums for their participation, and upon retirement, were given equal monthly benefits. Because of the fact, which is recognized by the majority, that women have a greater life expectancy than men, the result was an unequal treatment based upon sex. This unequal treatment favored women retirees, in that as a group they received the same monthly benefits, but received them for a longer period of time due to their longevity.

"It is obvious from the facts of the case that the Board determined that such unequal treatment should not prevail and the sexes should be treated equally. There were two avenues to pursue which would have resulted in equal treatment. One was to charge the men a smaller premium during their period of actual service, and upon retirement give equal payment to men and women. The other was to charge an equal premium regardless of sex, but upon retirement to pay a smaller monthly amount to the women retirees. The Board obviously chose the latter.

"The majority opinion points out that some women live no longer than some men and, in fact, some live a shorter time than some men. However the fact remains that given an equal number of men and women commencing retirement at a point in time, when all of the men have died, there will still be living approximately 17% of the women retirees who will continue to receive their monthly payment. Theoretically, at the time of the death of the last woman, an equal amount of retirement pay will have been received by the group of men and by the group of women. It therefore appears the action of the Board, rather than depriving persons of equal rights, has in fact equalized the benefits under the program.

"I would therefore hold the Board's action was entirely proper and that it did in fact cure a situation which was unequal so far as the sexes were concerned.

". . ."

In *Manhart, supra,* the fund required unequal contributions for equal monthly benefits. In *Henderson, supra,* the fund provides unequal monthly benefits for equal contributions. In either case, the need for higher contributions or lower monthly benefits must be determined by the life expectancy of the individual employe as may be gleaned only from a sex-differentiated actuarial table or a so-called "unisex" table.

First, it should be noted that the term "unisex annuity table" is not only a misnomer, it does not exist anymore than a "unisex" person exists. If a "unisex" annuity table were to be developed, it would itself be sex based. On the surface a "unisex" table would appear to merely be an averaging of the current individual male and female life expectancies. In fact, however, a "unisex" annuity table, like all annuity tables, would have to measure and project the life expectancy of the group. In order to know how many years the group might be expected to live, the actuaries would have to know how many members of the group are male and how many are female. As the composition of the group changes in percentage of

males and females, the group's "unisex" life expectancy will change—perhaps dramatically. The current sex-differentiated tables predict life expectancy of the group with a high degree of accuracy which remains unchanged over the years except for gradual increases in longevity brought about by advances in medical science and the standard of living. A so-called "unisex" table could be developed today, incur liabilities with an existing group at a contribution rate which could be seriously incorrect in a few years due to dramatic changes in the sex composition of the group work force. If females are not required to contribute more than males for equal monthly benefits or unless female monthly benefits are made smaller than males to account for longer female longevity, the 15% differential in cash must be borne by the employer or by transfer of male contributed funds to females or the parties must face the ultimate financial failure of the fund.

A "unisex" table which calculates monthly benefits for females at the current level for males would be actuarially false and cannot be supported by current employe contribution levels. Since existing pension benefits are vested, they cannot be reduced under the state trust law. Further, since the required contributions by the sexes must be equal, an increase in the level of employe contributions to fund the equalization

of female contributions would necessarily result in additional disparity in the cost-benefit ratio for males.

If employe contributions were made voluntarily rather than a "condition of employment," it can reasonably be expected that the males would buy their annuities from private insurance carriers whose rates would still reflect the lower cost for men than women. The constitutency of the fund would become predominately female, the rate of annuity benefit pay-out would seek its own level (i.e. female) and women would receive only that amount of monthly benefits their contributions can actuarially "purchase."

When one considers that the females as a class are already receiving a greater contribution from the employer than males (in the form of a 110% matching employer contribution of a greater female contribution) and even a short lived female or her beneficiary will receive no less than a return of all her contributions plus earnings thereon, it becomes increasingly difficult to equate their treatment with "invidious" sex discrimination in violation of Title VII.

It is submitted that the overall effect of the retirement system is quite fair and in fact favors females.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court should be reversed.

Respectfully submitted,
STATE OF OREGON
JAMES A. REDDEN
Attorney General
AL J. LAUE
Solicitor General
WILLIAM F. HOELSCHER
Assistant Attorney General
and Counsel

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Brief Amicus Curiae have been served by mail, this date to David J. Oliphant, Deputy City Attorney, 111 North Hope Street, P.O.Box 111, Los Angeles, California 90051; Katherine Stoll Burns, Robert M. Dohrmann, Howard M. Knee; Schwartz, Steinsopher, Dohrmann & Krepock, Two Century Plaza, Suite 1900, 2049 Century Park East, Los Angeles, California 90067; A.C.L.U., Michael Evan Gold, 3636 Somerset Drive, Los Angeles, California 90016; Equal Employment Opportunity Commission, Abner Sibol, Joseph T. Eddins, Beatrice Rosenberg, Charles L. Reischel, Mary-Helen Mautner, 2401 E Street, N.W., Washington, D.C. 20506, and John H. Larson, County Counsel, Ronald J. Selfroth, Deputy County Counsel, 648 Hall of Administration, 500 West Temple Street, Los Angeles, California 90012.

WILLIAM F. HOELSCHER
Assistant Attorney General and
Counsel
Of Attorneys for State of Oregon